

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL ODEEN FOSTER,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

NO. CV-05-3069-MWL

REPORT AND RECOMMENDATION TO DENY
IN FORMA PAUPERIS STATUS AND TO
DISMISS COMPLAINT

Plaintiff, a federal prisoner currently housed at the Federal Corrections Center at Sheridan, Oregon, brings this *pro se* action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346. Following review of Plaintiff's Complaint, the Application to Proceed *in Forma Pauperis* is **DENIED** as no cognizable claim is stated at this time.

Plaintiff asserts Defendant United States Department of Justice is the federal agency responsible for housing him at the Yakima County Jail in January 2004. Plaintiff asserts he should have been transferred to a federal facility when his leg wound became infected and he fell from a top bunk, breaking two toes. Plaintiff complains he subsequently fell in the shower in late March 2004, when he was unable to afford or secure a pair of shower shoes. Plaintiff states

1 he suffered a broken collar-bone, cracked ribs and a head concussion.

2 Although Plaintiff admits he was taken to the hospital, he
3 asserts U.S. Marshals were deliberately indifferent to his medical
4 care by allegedly obstructing doctors from obtaining correct x-ray
5 images, and by not providing pain medication for over 72 hours.
6 Plaintiff complains once he began receiving pain medication, it was
7 stopped four days later. Plaintiff states he continued to suffer
8 intense pain seven days after his fall, but was not permitted to see a
9 doctor.

10 Plaintiff asserts after a month of requesting to see a doctor and
11 being refused, medical staff at the jail provided Plaintiff a brace to
12 wear. Plaintiff complains this brace was then taken during a
13 "shakedown" for unrelated reasons. Plaintiff asserts the refusal to
14 allow him to see a doctor must have come from a federal agency.
15 Plaintiff blames the U.S. Attorney for choosing to prosecute a state
16 crime as a federal one and the U.S. Marshal's office for maintaining
17 physical custody of Plaintiff, and choosing to house him in allegedly
18 substandard conditions.

19 Plaintiff asserts he filed a claim with the Bureau of Prisons,
20 but the claim was rejected on grounds the federal government is not
21 liable for the torts of its contract facilities. Pursuant to the
22 denial letter, Plaintiff had six months to bring suit in the
23 appropriate federal district court.

24 **INDEPENDENT CONTRACTOR EXCEPTION**

25 Plaintiff has failed to allege the Department of Justice had
26 authority over the daily operations of the Yakima County jail; thus,
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1 his claims arising from his treatment there are barred by the
2 independent contractor exception to the FTCA. *Letnes v. United States*,
3 820 F.2d 1517, 1518-19 (9th Cir. 1987). Plaintiff alleges no facts
4 demonstrating the Department of Justice had authority and substantial
5 supervision over the daily operations of the Yakima County jail.
6 Accordingly, **IT IS RECOMMENDED** the federal tort claims be **DISMISSED**
7 **WITHOUT PREJUDICE** for lack of subject matter jurisdiction.¹

8 **OBJECTIONS**

9 Any party may object to a magistrate judge's proposed findings,
10 recommendations or report within ten (10) days following service with
11 a copy thereof. Such party shall file written objections with the
12 Clerk of the Court and serve objections on all parties, specifically
13 identifying any the portions to which objection is being made, and the
14 basis therefor. Any response to the objection shall be filed within
15 ten (10) days after receipt of the objection. Attention is directed
16 to Fed. R. Civ. P. 6(e), which adds another three (3) days from the
17 date of mailing if service is by mail.

18 A district judge will make a de novo determination of those
19 portions to which objection is made and may accept, reject, or modify
20 the magistrate judge's determination. The judge need not conduct a
21 new hearing or hear arguments and may consider the magistrate judge's
22 record and make an independent determination thereon. The judge may,
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24 ¹It may be that Plaintiff could state a claim for relief under 42 U.S.C. § 1983 and violations of
25 the Eighth Amendment against individual Yakima County jail officials, and/or that he could state a claim
26 against individual U.S. Marshals under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388
27 (1971). However, such claims were not been pleaded here.

1 but is not required to, accept or consider additional evidence, or may
2 recommit the matter to the magistrate judge with instructions. *United*
3 *States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C.
4 § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73; LMR 4, Local Rules for the
5 Eastern District of Washington.

6 A magistrate judge's recommendation cannot be appealed to a court
7 of appeals; only the district judge's order or judgment can be
8 appealed.

9 **IT IS SO RECOMMENDED.** The District Court Executive is directed
10 to file this Report and Recommendation and provide copies to Plaintiff
11 and to the referring judge.

12 **DATED** this 13th day of September 2005.

13
14 S/ Michael W. Leavitt
15 MICHAEL W. LEAVITT
16 UNITED STATES MAGISTRATE JUDGE
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